United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 25, 2010

TO : James Small, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

530-6067-4001-1700
530-6067-4001-3300

SUBJECT: Sodexo Healthcare Services
Case 21-CA-39113

The Region submitted this matter for advice as to whether the Employer violated Section 8(a)(5) by announcing to employees, but not implementing, a new fee that would have modified their health benefits. We conclude that the Employer did not violate the Act because the announcement, absent implementation, did not constitute a completed unilateral change in employees' terms and conditions of employment.

FACTS

Charging Party Service Workers United (SWU) represents food service workers employed by Respondent Sodexo Healthcare Services at USC University Hospital in southern California. Under the parties' initial collective-bargaining agreement, the Employer is required to pay, beginning in 2007, 75 percent of employee health care premiums. However, the agreement further provides that premiums "will be adjusted annually consistent with the Employer's policies and practices … ."

On October 19, 2009,[1] the Employer posted notices directed to Sodexo employees at USC Hospital, as well as other, otherwise unrelated Sodexo locations. The notice announced that, effective January 1, 2010, employees participating in the contractual health insurance program would be charged an additional $600 per year as a "nicotine surcharge" unless they individually certified by November 13 that they do not use nicotine products. The Employer did not concurrently notify the Union of the nicotine surcharge. Rather, Union officials learned about it from employees only after the Employer posted the notices.

Shortly after the Union learned of the surcharge, Union representative Larry Alcoff contacted Jim Feingold,

[1] All dates are in 2009 unless set forth otherwise.

Sodexo's Director of Labor Relations, to demand bargaining. Alcoff also filed a grievance on behalf of all affected bargaining unit employees system-wide, and made a series of requests for information.[2] Alcoff told Feingold that the Union viewed the nicotine surcharge as part of the health insurance premium, requiring Sodexo to shoulder 75% of the cost to employees. Alcoff further complained about Sodexo's lack of notification to the Union prior to its posting of the notice to employees, and maintained that the Union was entitled at the minimum to engage in effects bargaining. Sodexo countered that it had no duty to bargain about the surcharge because it was not a change to the premium, but rather was a plan design change within its unilateral control. The parties subsequently engaged in settlement negotiations and the Employer responded, in part, to the Union's multiple information requests.

On December 21, the Employer advised the Union by email of Sodexo's decision not to implement the nicotine surcharge for 2010. Subsequently, the Union posted leaflets at the Hospital, both in English and Spanish, entitled "We Snuffed out Sodexo's Plan to Add a $600 Smoking Surcharge to Health Insurance" (emphasis in original). In the leaflet, the Union explained how it "fought back and won" after the Employer decided to implement the nicotine surcharge. Although the Employer did not directly notify employees of its decision not to implement the nicotine surcharge, it notified the Union and asserts that the Union widely publicized the decision to its membership. Sodexo also posted on its bulletin board at the Hospital a memo addressed to "Unit Manager," providing that "For Plan Year 2010, all employees represented by a union or covered by a collective-bargaining agreement and eligible to participate in a standard Sodexo medical plan will not be subject to the nicotine surcharge."

ACTION

We conclude that the Employer's announcement itself, absent implementation, did not constitute a completed unilateral change in employees' terms and conditions of employment in violation of the Act.

An announced unilateral change to a mandatory subject of bargaining (such as employee health insurance) is unlawful even if not put into practice, where the announcement would cause a reasonable employee to view the

[2] It is unknown whether and to what extent unit employees were aware of the Union's activities.

change as effectively implemented.[3] In such circumstances, a bargaining violation is not dependent on additional action to implement a plan because the announcement itself diminishes the union's relevance as bargaining representative.[4] Thus, "[t]he damage to the bargaining relationship had been accomplished simply by the message to the employees that the Respondent was taking it on itself to set this important term and condition of employment."[5] On the other hand, Section 8(a)(5) is not violated where "a reasonable employee would not understand [the employer's] discussions about a proposed … change as the announcement of a change that was effectively implemented."[6] A union's relevance may actually be bolstered by the employer's willingness to abandon the schedule change upon protest.[7]

We conclude that under the circumstances here, the Employer's announcement of a new fee and subsequent retraction in the face of the Union's multi-faceted response would not lead a reasonable employee to believe that the Employer had relegated to itself the power to

---

[3] See ABC Automotive Products Corp., 307 NLRB 248, 250 (1992); Kurdziel Iron of Wauseon, 327 NLRB 155, 156 (1998) (finding 8(a)(5) violation where manager showed employees a "Reminder Memo" stating that lunch breaks were ten minutes shorter than in the past, even though shortened break period was never actually enforced).

[4] See ABC Automotive Products, 307 NLRB at 250. See also Wire Prods. Mfg. Corp., 326 NLRB 625, 627 (1998), enfd. sub nom. NLRB v. R.T. Blankenship Assocs., 210 F.3d 375 (7th Cir. 2000) (employer's announcement to employees of conversion of profit-sharing plan into ESOP in midst of extensive unfair labor practice campaign conveyed message respondent no longer intended to deal with union).

[5] ABC Automotive Products, 307 NLRB at 250 (unlawful announcement that striking employees must return to work, after which employer would implement final offer terminating contributions to union health fund; health plan was "effectively implemented when it was announced," as employees would think that new health plan was in place if they were to return to work).

[6] Eagle Transport Corp., 338 NLRB 489 (2002).

[7] Id. (employer's post-certification unilateral solicitation of employees' preferred schedule changes not Section 8(a)(5) violative; employer ceased is solicitations after union complained that schedule modifications would constitute an unlawful unilateral change).

impose this change. The Union filed grievances and multiple information requests immediately after learning of the Employer's posted announcement. The Union's consistent demand that the Employer drop this announced change ultimately resulted in its retraction. Although the Employer set an interim date for employees to assert whether or not they used nicotine products, it retracted its proposal prior to the announced January 1 date of implementation. Both the Employer and the Union posted this retraction on bulletin boards for employees to see; the Union argued to employees that the it had "won" its dispute with the Employer on their behalf. Thus, as in Eagle Transport, the Union reinforced its authority in the workplace by showing employees that it successfully countered an unpopular Employer proposal. Under these circumstances, and in the absence of contemporaneous bargaining violations that would tend to undercut the Union's stature in employees' eyes, we conclude that the Employer's unimplemented announcement did not violate the Act.

B.J.K.